Supreme Court, U.S.
FILED
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(2)

No. 01-1297

IN THE

Supreme Court of the United States

CHARLES L. GRIMES AND GORDON W. CHAPLIN, TRUSTEES UNDER THE WILL OF LOUISE C. CHAPLIN; CHARLES L. GRIMES AND GORDON W. CHAPLIN, TRUSTEES UNDER THE LOUISE D. CATHERWOOD TRUST; AND GORDON W. CHAPLIN, INDIVIDUAL TRUSTEE OF THE JESSICA D. CATHERWOOD TRUST,

Petitioners,

v.

NAVIGANT CONSULTING, INC.; POLICEMEN AND FIREMEN RETIREMENT SYSTEM OF THE CITY OF DETROIT; *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT PLAINTIFF CLASS

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STATEMENT

Petitioners are objectors to a securities class action settlement that was approved by the trial court over their objections. The claims in the class action stem from Navigant Consulting, Inc.'s ("Navigant") improper use of the pooling of interests method of accounting to account for four companies it acquired during the first quarter of 1999. As a result of that improper accounting, Navigant reported earnings that were wrongfully inflated. Investors were alerted to the alleged improprieties before the stock market opened on November 22, 1999, when Navigant publicly disclosed that its accountants had questioned the Company's use of the pooling method and that it might have to restate its prior financial statements. The market's reaction to this disclosure was swift and dramatic. Navigant's common stock dropped 45% on November 22, falling from $26.00 to $14.25 per share. Pet. App. 4a. Subsequently, on January 24, 2000, Navigant confirmed that it had restated its financial statements for the first three quarters of 1999. After the January 24, 2000, disclosure, the price of Navigant common stock rose 13.8%, from $9.9375 to $11.5125. *See* Lead Plaintiff's Reply Memorandum in Support of Final Approval of Settlement, Plan of Distribution and Attorney's Fees, at 8.

The class action settlement resolved the claims of all those who purchased Navigant securities during a class period from January 1, 1999, through and including November 19, 1999 (the last trading day prior to Navigant's disclosure). The settlement provided that in exchange for $23 million in cash (plus 50% of any recovery obtained by Navigant as a result of its litigation with one of its insurance carriers), class members released all claims for damages arising from statements defendants made during the class period, including any damages

with respect to purchases of Navigant stock after the class period based on these class-period statements that Plaintiffs challenged as being false and misleading. *See* Stipulation of Settlement (Sept. 22, 2001), at 8-9.

Petitioner Charles L. Grimes ("Grimes") represents certain trusts (the "Trusts") that allegedly purchased Navigant stock in both November and December 1999.[1] No later than August 2000, Grimes was informed that the class period would conclude on November 19, 1999, and that there would be no recovery in this case with respect to purchases of Navigant securities after that date.[2] Pet. App. 4a. Grimes did

1. Grimes, a lawyer, is a serial plaintiff who has filed no fewer than eight cases, all of which were ultimately dismissed. *See, e.g., Grimes v. Wetzler*, 749 A.2d 535 (Pa. Super. Ct. 2000) (suing New York Tax Commissioner for constitutional violations); *appeal denied*, 766 A.2d 1249 (Pa.), *and cert. denied*, 533 U.S. 924 (2001); *Grimes v. Northwest Airlines, Inc.*, No. Civ. A. 98-CV-4794, 1999 WL 562244 (E.D. Pa., Jul. 30, 1999) (suing for damages relating to injuries he allegedly sustained after being arrested on an airplane for disorderly conduct); *Grimes v. Camilli*, 238 A.D.2d 289 (N.Y. App. Div. 1st Dept. 1997) (action to recover legal fee notwithstanding Grimes' admission that "he was never the counsel of record and never took part in any court proceeding related to the probate matter in which defendant was involved, did not prepare any documents in their final form, did not maintain any time records and did not conduct depositions"). This Petition for Certiorari is Grimes' fifth attempt to seek this Court's review. His four prior petitions were denied. *See Grimes v. Wetzler*, 533 U.S. 924 (2001); *Grimes v. Northwest Airlines, Inc.*, 531 U.S. 879 (2000); *Grimes v. Vitalink Comm. Corp.*, 525 U.S. 867 (1998); *Grimes v. John P. McCarthy Profit Sharing Plan*, 506 U.S. 861 (1992).

2. Separately, in his personal capacity, Grimes claims to be the largest individual holder of Navigant common stock, but he purchased (Cont'd)

not then seek to intervene on behalf of the Trusts. Instead, in September 2000, after the settlement of this case was announced, Grimes filed his own separate class action against Navigant. That action, *Grimes v. Navigant Consulting, Inc.*, No. 00 C 7609 (N.D. Ill.), is based on identical misrepresentations but alleged a class period that extended through January 24, 2000, to provide a recovery for purchases of Navigant securities after November 19, 1999. Grimes unsuccessfully sought to have *Grimes v. Navigant* consolidated with this case, and the case was assigned to a different judge (Honorable Elaine Bucklo). Rather than having the Trusts opt out of this class action to pursue their claims in *Grimes v. Navigant*, Grimes chose to keep the Trusts as class members and object to the settlement. *See* Objection to Approval of Settlement by Charles L. Grimes and Gordon W. Chaplin ("Objection"), at 11-12.[3] Despite many

(Cont'd)

none of his shares during the class period; he purchased 513,000 shares between November 26, 1999, and January 24, 2000. *See* Certification of Charles L. Grimes to Complaint in *Grimes v. Navigant Consulting, Inc.*, No. 00 C 7609 (N.D. Ill.).

3. Unlike most objectors to class action settlements, Grimes did not challenge the amount of the settlement. On the contrary, he thought the recovery it provided was so good that he wanted class members to share it with non-class members: post-November 19 purchasers, including himself. *See* Objection at 11-12. Grimes also objected to one aspect of the Notice of Class Action Settlement, regarding disclosure of counsel fees. Because the precise amount of the portion of the settlement related to the pending litigation with Navigant's insurer was not known when the Notice was sent, the Notice stated that counsel would seek 20% of the Settlement Fund. The District Court found that the Notice adequately informed the class that attorneys' fees would be calculated on the total Settlement Fund, including both the fixed and as-of-yet undetermined portions. Tr. of Proceedings, Mar. 22, 2001. Notably, Grimes did not object to the fee percentage sought by class counsel.

opportunities (*see* Pet. App. 4a-5a, 13a-14a), Grimes did not seek to intervene the Trusts as parties to the action while the case was pending in the District Court.

After the Trusts' objection was denied and the settlement was approved by the District Court, Grimes filed a Notice of Appeal to the Seventh Circuit. However, that appeal was voluntarily dismissed after the Seventh Circuit questioned Petitioners' standing due to their failure to intervene. Pet. App. 10a, 12a. Only then did Grimes move on behalf of the Trusts to intervene as a party. The District Court denied Petitioners' motion to intervene, finding it "as untimely as it gets," because Petitioners did not move until nearly nine months after their disagreement with certain terms of the settlement became clear and nearly two months after their objections had been overruled. Pet. App. 14a. The Seventh Circuit affirmed. Pet. App. 7a. The Seventh Circuit also dismissed Petitioners' conditional appeal from the trial court's order approving the class action settlement, due to lack of jurisdiction, citing *Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998), affirmed by an equally divided court under the name *California Public Employees' Retirement System v. Felzen*, 525 U.S. 315 (1999). Pet. App. 7a.

Since the Seventh Circuit's decision, Judge Bucklo has dismissed *Grimes v. Navigant Consulting, Inc.* in its entirety for failure to state a claim. 185 F. Supp. 2d 906 (N.D. Ill. 2002). Thus, the very claims that Grimes contends should have been included in the resolution of this case have been found meritless as a matter of law.

ARGUMENT

THE PETITION FOR CERTIORARI SHOULD BE DENIED

There is no reason to grant certiorari in this case. As Petitioners concede, the issue presented by the petition is the same issue now before the Court in *Devlin v. Scardelletti* (No. 01-417), in which this Court heard argument on March 26, 2002. Pet. 9. This Court routinely holds or defers consideration of petitions for certiorari pending the outcome of another case that raises the same issues for which review is sought. *See, e.g., Stutson v. United States*, 516 U.S. 163 (1996) (Scalia, J. dissenting) ("We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted"); *Winfield v. Kaplan*, 512 U.S. 1253 (1994) (Scalia, J. dissenting) (noting that disposition on petition for certiorari was deferred pending announcement of judgment in a case that presented similar issues).[4] In this case, however, certiorari should be denied immediately because Petitioners cannot prevail no matter how this Court rules in *Devlin*.

I. If This Court In *Devlin* Requires Intervention To Preserve Appeal Rights, The Seventh Circuit's Decision Would Stand.

Should this Court rule in *Devlin* that party status is necessary to appeal the denial of objections to a settlement, the Seventh Circuit's decision would stand and certiorari should be denied.

4. The fact that Grimes formulated a second question in his petition -- if intervention is required, should it be *pro forma*? (Pet. 10) — does not make this case any more worthy of certiorari, since Grimes already presented that very argument to the Court as an *amicus* in *Devlin*. *See* No. 01-417, Brief of Charles L. Grimes, *et al.* as *Amici Curiae* in Support of Petitioner, at 24-25.

II. Even If This Court In *Devlin* Holds Intervention Is Not Necessary To Preserve Appeal Rights, The Petition For Certiorari Should Be Denied Because Petitioners' Argument In Support Of Their Objection To The Settlement Is Precluded By *Res Judicata.*

In their Statement of the Case, Petitioners failed to disclose two key facts: (1) Grimes has instituted a separate class action in which he sought to recover on the very same claims Petitioners contend were improperly excluded by the settlement here; and (2) that action was dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. *Grimes v. Navigant*, 185 F. Supp. 2d 906. Therefore, the Petition should be denied because the post-November 19 claims that Petitioners contend were improperly excluded from the settlement are precluded by *res judicata*.

Petitioners objected to the settlement because it released all claims of class members arising from alleged misrepresentations made during the class period. Petitioners contended that it was unjust to release any such claims relating to post-class period purchases allegedly made in reliance upon misrepresentations made during the class period because the settlement did not provide a recovery for those purchases.[5] *See* Objection at 8. The premise of Grimes'

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5. Importantly, this was a Rule 23(b)(3) class with full opt out rights. At the point when class members had to decide whether to opt out of the class, they knew the value of the settlement. Thus, each class member, including the Trusts, was able to evaluate whether the consideration being offered was adequate to warrant the release of all claims based on statements made during the class period, which was required to participate in the settlement.

objection is that these claims, based on the impact of class period statements on post-class-period purchases, have value. However, in *Grimes v. Navigant*, the court held as matter of law that those very claims have no value.

In *Grimes v. Navigant*, Petitioner Grimes, individually and on behalf of a class of persons who purchased Navigant stock from May 6, 1999, through January 24, 2000, asserted 10b-5 claims identical to those asserted in this class action — that the accounting for Navigant's first quarter acquisitions was improper — but with a different class period. 185 F. Supp. 2d at 908-09. *Grimes v. Navigant* alleged that the misrepresentations concerning the pooling method of accounting were not corrected until the Company announced the restatement of its financial statements on January 24, 2000. The District Court dismissed that action in its entirety, holding that shareholders could not recover for purchases of stock made after the November 22 disclosures.[6] Because the price of Navigant stock actually rose on January 24, 2000 (Grimes' purported cure date), the court held that any misrepresentations not cured by the November 22 disclosures, as a matter of law, were not material. *Id.* at 914.

The court's dismissal of *Grimes v. Navigant* pursuant to Rule 12(b)(6) "constitutes a final adjudication on the merits" for *res judicata* purposes. *Wade v. Hopper*, 993 F.2d 1246, 1252 (7th Cir. 1993). *See also Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3 (1981) ("The dismissal for failure to state a claim under Federal Rule of Civil Procedure

6. The court dismissed claims asserted for pre-November 22 misrepresentations because Grimes purchased his shares on November 26, 1999, and as a matter of law he could not recover for frauds disclosed before he bought his stock. *Grimes v. Navigant*, 185 F. Supp. 2d at 912.

12(b)(6) is a 'judgment on the merits'" with full *res judicata* effect). That Grimes has appealed the dismissal of his claims does not deprive the judgment of its res judicata effect. *Deposit Bank of Frankfort v. Board of Councilmen of Frankfort*, 191 U.S. 499 (1903) (original state court judgment entitled to *res judicata* effect in subsequent federal action so long as state case remained pending without decision on appeal); *Smith v. SEC*, 129 F.3d 356, 362 n.7 (6th Cir. 1997) (pending appeal of judgment does not deprive the judgment of *res judicata* effect).

Thus, even if Grimes (on behalf of the Trusts) could appeal the denial of his objection, such an appeal would be futile: the issue of whether there can be a recovery for purchases of Navigant securities after November 19, 1999, based on statements made before that date has been determined and is *res judicata*. Accordingly, the issue underlying Grimes' objection has been resolved against him in his subsequent action.

III. If This Court in *Devlin* Requires Intervention To Preserve Appeal Rights And Holds It Must Be Granted Liberally, the Petition For Certiorari Should Be Denied Because Petitioners' Motion to Intervene Failed Under The Most Liberal Standard.

The Seventh Circuit liberally grants class members' motions to intervene to preserve appeal rights. *See In re Synthroid Marketing Litig.*, 264 F.3d 712, 715 (7th Cir. 2001); *Crawford v. Equifax Payment Servs., Inc.*, 201 F.3d 877, 881 (7th Cir. 2000). Though it applied that standard in this case, Pet. App. 3a, the intervention motion did not succeed, given Grimes' lengthy and prejudicial delay. Thus, even if the Court were inclined in *Devlin* to liberalize the granting of intervention motions by objecting class members solely to preserve appeal rights, certiorari still should be denied in this case.

In affirming the District Court, the Seventh Circuit noted "that intervention should be freely allowed, if limited to the purpose of taking an appeal. But this attitude cannot abolish the requirement in Rule 24 that intervention be timely." Pet. App. 3a. In light of this liberal allowance of intervention, and applying the timeliness standard derived from this Court's decision in *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977),[7] the Seventh Circuit concluded that the District Court properly exercised its discretion as gatekeeper in denying the motion to intervene. Nearly nine months before moving to intervene, Petitioners knew that the settlement provided no recovery for post-class period purchasers yet waited without justification to seek intervention until final judgment had been entered and their first attempt to appeal had been questioned. Pet. App. 4a-5a. Indeed, Petitioners did not lose on the motion to intervene simply because it was made post-judgment. While noting that it is "hard to see how a post-judgment motion could be timely," the Seventh Circuit stated "'hard' differs from 'impossible'" and cited *United*

7. The rulings below are wholly consistent with this Court's holding in *United Airlines*. In *United Airlines*, this Court held that a putative class member's motion to intervene for the purpose of appealing the District Court's denial of class certification should have been granted as timely when that motion was made as soon as it was clear that the named plaintiffs would not appeal that denial, which did not become apparent until after judgment. Notably, the standard this Court applied is the very standard applied below: intervention is required "as soon as it became clear to the respondent that the interests of the unnamed class members would no longer be protected by the named class representatives." 432 U.S. at 394. Far from the blanket approval of post-judgment intervention motions that Petitioners erroneously characterize it to be, *United Airlines* is further support for the need of unnamed class members to move timely for intervention to preserve appeal rights once they conclude that the class representative will not protect their interests.

Airlines as an example of a circumstance where post-judgment intervention motions are properly allowed. Pet. App. 2a. The plain fact is that Grimes knew his claims were not being represented in this case at least seven months before judgment and did not seek to intervene.

This case illustrates the prejudice that can occur when there is no gatekeeper to screen out persons who lack *bona fides*. Although Rule 24(a) sets a liberal standard for intervention by a class member, it requires the trial court to screen out those who fail to satisfy the requirements of the rule, including the plain requirement to make a timely motion. *See Vollmer v. Publishers Clearing House*, 248 F.3d 698, 705 (7th Cir. 2001). As the Seventh Circuit noted, Petitioners' failure to intervene timely prejudiced the Respondents by depriving them of the opportunity to develop a factual record concerning the circumstances surrounding Petitioners' stock purchases and whether the objection was being pursued in good faith. Pet. App. 7a. Grimes claims to be the largest individual shareholder of Navigant but he is not a class member. *See* Affidavit of Charles L. Grimes (Feb. 23, 2001) at ¶¶ 6, 8. In August 2000 (seven months before the settlement approval hearing), Grimes learned of the settlement and expressed to Lead Counsel his intention to object on his own behalf, only to be told that, as a non-class member, he lacked standing. *See* Lead Plaintiff's Position on Reassignment of the Grimes Action, at ¶ 6. Even though Grimes could have excluded the Trusts from the class and preserved all of the claims he contended had value, he chose not to opt out and instead filed objections on the Trusts' behalf which, if successful, would have had the effect of benefitting himself personally far more than the Trusts for which he is a fiduciary. Had the Trusts timely moved to intervene, they would have subjected Grimes to discovery concerning the true party in

interest behind the objection and whether Grimes was elevating his personal interests over those of the Trusts. By failing to seek intervention, as the Seventh Circuit observed, "these objectors hobbled that inquiry." Pet. App. 7a. Given that intervention requirements under Rule 24(a) are easily met by class members with legitimate objections, there was no justification for sidestepping the Rule's gatekeeping function in this case.

Thus, even under the very liberal standards the Seventh Circuit has formulated for class member intervention under Rule 24(a), Petitioners' motion was properly denied.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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